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11 OF AMERICA, AFL-CIO

12 UNITED STATES OF AMERICA
13
14 NATIONAL LABOR RELATIONS BOARD

15 PURPLE COMMUNICATIONS,

16 Employer/Respondent,

17 and

18 COMMUNICATIONS WORKERS OF
19 AMERICA, AFL-CIO,

20 Charging Party/Petitioner.

Case Nos. 21-CA-095151; 21-RC-091531;
21-RC-091584

**CROSS-EXCEPTIONS TO THE
SUPPLEMENTAL DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

22 Charging Party and Petitioner Communications Workers of America (“CWA” or “Union”)
23 hereby files the following Cross-Exceptions to the Supplemental Decision of the Administrative
24 Law Judge (“ALJ”).

25 **No. Cross-Exception Language**

- 26 1. Pg. 2:9, *passim* To the references here and throughout the Decision that suggest that
27 the Board limited the use of company’s email systems to non-
28 working time. The Board’s decision in *Purple* does not prohibit or
limit employees from using the email systems or other electronic
communications systems on working time. Rather, the Board
established a presumption that, on non-working time, the employees
have access to use the email system without disturbing their right to
use the email system or other electronic communication systems on
work time.

<u>No.</u>	<u>Cross-Exception</u>	<u>Language</u>
2.	Pg. 2, line 15	To use of the term “non-work email.” To the contrary, statutorily protected communications are work related and thus “work” email. If they were not “work related,” they would not be for mutual aid or protection.
3.	Pg. 2, line 18-21	To the suggestion that the Board held that an employer can implement a “total ban” on employee use of company email system for Section 7 purposes. This issue was not resolved.
4.	Pg. 2, lines 21-23	To the statement by the ALJ that the Board’s decision in <i>Purple</i> does not apply to other types of electronic communication systems. These cross-exceptions encompass all references in this Decision that suggest that these policies should not apply to other forms of electronic communication systems.
5.	Pg. 2, lines 23-25	To the suggestion that the remedy would be limited. The Charging Party did not have the right to take exception to the language in the Board’s decision regarding remedy because it was remanded and not a final Decision. Nonetheless, the remedy adopted by the ALJ is inadequate with respect to notification posting. See <i>infra</i> .
6.	Pg. 2, lines 28-30	To the suggestion that the ALJ correctly follow the Board’s Decision and remand in <i>Purple</i> .
7.	Pg. 3, lines 1-4:17	To the failure of the ALJ to find many important facts regarding use of electronic communications systems that were established in the record.
8.	Pg. 3, Line 11	To the suggestion that there is no access to the internet at the work stations. There is limited access to the internet.
9.	Pg. 3, lines 9-14	To the failure of the ALJ to find that the employees have access to the company’s intranet from the work stations and the shared computers located in common areas in the facilities.
10.	Pg. 3, lines 16-19	To the failure of the ALJ to find that the individual email accounts may be accessed also from the shared computers. Furthermore, the ALJ failed to recognize that managers and supervisors have access to the same email accounts and can send emails to the employees on work and non-work time. Furthermore, Employees can send emails to managers and supervisors on both work and non-work time.
11.	Pg. 3, lines 18-20	To the failure of the ALJ to find specifically that these communications among employees and among employees and managers occur during work time and non-work time.

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12.	Pg. 3, fn. 5	The parties stipulated that the handbook was in effect in these two locations. The handbook itself, the context of the testimony and the record establish that it is effective throughout Purple's facilities.
13.	Pg. 3, lines 1-4:17	To the failure of the ALJ to find that Purple permitted employees to use company email for work related communications including Section 7-protected messages in opposition to the Union.
14.	Pg. 3, lines 1-4:17	To the failure of the ALJ to recognize that the Respondent's Exhibit 8 reflected emails sent during work time and non-work time using the Purple Communications email system when employees solicited opposition to the Union.
15.	Pg. 3, lines 1-4:17	To the failure of the ALJ to find that Purple Communications condoned such email in opposition to the Union during work and non-work time.
16.	Pg. 3, lines 1-4:17	To the failure of the ALJ to find that such employee use of company email was routine and tolerated by Purple Communications.
17.	Pg. 3, lines 1-4:17	To the failure of the ALJ to find that Purple provided no evidence of any employee ever being disciplined for violating its electronic communications policy.
18.	Pg. 3, lines 1-4:17	To the failure of the ALJ to find routine employee use of company email to communicate with one another, unlimited employee access to company email on non-work time, including in break rooms and from home, and unlimited employee access to company email during work time when not otherwise engaged in interpreting for clients and finally that no employee was ever disciplined for non-business use or for non-work related use of company email that involved statutorily protected rights.
19.	Pg. 3, lines 1-4:17	To the failure of the ALJ to find that the email system was routinely used and allowed by the company for use by employees for work related issues, including for statutorily protected communications.
20.	Pg. 4, lines 10-14	To the failure of the ALJ to find that Purple offered no evidence that it takes any action to protect against computer viruses.
21.	Pg. 4, lines 10-14	To the failure of the ALJ to find that the employer takes any precautions to prohibit or monitor the transmission of inappropriate information.
22.	Pg. 4, lines 10-14	To the failure of the ALJ to find that the reference to "inappropriate information" would encompass information about wages, hours and working conditions and other business information that employees

<u>No.</u>	<u>Cross-Exception</u>	<u>Language</u>
		could distribute as part of statutorily protected activity and is thus vague and overbroad.
23.	Pg.4 , lines 10-14	To the failure of the ALJ to recognize that the prohibition against “the release of confidential company information” is overbroad in that such confidential company information would include matters relating to wages, hours and working conditions or other statutorily protected communications.
24.	Pg. 4, line 13-6	To the failure of the ALJ to find that the employer failed to offer any evidence that it takes any effort to prevent computer viruses from contaminating the call center.
25.	Pg. 3, lines 4-4:16 FACTS	To the failure of the ALJ to find that the same electronic communications equipment is used at all the call centers.
26.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that video interpreters use the email system every day.
27.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that there are three separate computer terminals available to the video interpreters. Those computers are at their work stations, a shared computer maintained in the central point of the office (known as the Queue Computer) and a terminal in the lunch or break room.
28.	Pg. 3, lines 4-4:16	To the failure of the ALJ to recognize that the interpreters have access to Purple’s intranet at their work stations. Access to the internet is limited at the work station.
29.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that video interpreters have games loaded on to their work station computers, which they may use during work time.
30.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that the Queue Computer located in the central part of the office has Internet Explorer access to the Internet.
31.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that the AOL Messenger is constantly on and that the computer is used for communicating operations to other centers through AOL Messenger. All interpreters have access to Internet Explorer from this terminal.
32.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that in the break room there is a computer available to the employees with internet access. The company intranet is also available as well as other programs, such as Microsoft Word, which the employees may use.

<u>No.</u>	<u>Cross-Exception</u>	<u>Language</u>
33.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that two video interpreters advised management of the anti-union conduct by using the company email. These communications were during work time.
34.	Pg. 3, lines 4-4:16	To the failure of the ALJ to specifically find that the employer uses the email system to send memoranda or other information to the interpreters regarding issues concerning working conditions. These are considered work related or business related.
35.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that Purple used an email Newsletter, which it sent through the company email to employees.
36.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that the President of the company testified that the email was used during the representation election campaign.
37.	Pg. 3, lines 4-4:16	To the failure of the ALJ to recognize that the employer has an open door policy and, because the headquarters are located off-site in Rocklin California, that open door policy would have to include use of email.
38.	Pg. 3, lines 4-4:16	To the failure of the ALJ to recognize that the CEO testified that Purple repeatedly used the word “communication” in captive audience meetings and otherwise communicating with the video interpreters.
39.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that human resources material is available on the company intranet. That information is available from all the computer work stations during work and non-work time.
40.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that Purple relies on various social media services.
41.	Pg. 3, lines 4-4:16	To the failure of the ALJ to recognize that Purple’s rules permit personal use of the phone for up to 3 minutes per call.
42.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that there is no policy prohibiting employees from using their cell phones, including an email or text messaging function on their phones, or other personal devices during work.
43.	Pg. 3, lines 4-4:16	To the failure of the ALJ to recognize that any hearing impaired employee may use the “relay” to make personal calls or communications.
44.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find, based on the record, that employee non-business use of company email was routine and tolerated by

<u>No.</u>	<u>Cross-Exception</u>	<u>Language</u>
		Purple Communications.
45.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that work related use of company email for statutorily protected communications was routine and tolerated by Purple Communications.
46.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that there are substantial periods of time during working time when Video Interpreters do not have any work to perform.
47.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that the Video Interpreters are expected to be logged on for only 80% of their core hours and 85% of their non-core hours. This allows them a substantial part of their work time to be performing other functions, including use of the email or other communication systems for statutorily protected communication.
48.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that the video interpreter has to process calls only 55% of each shift, thus leaving 45% of their shift for other communications or other activity.
49.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that there are substantial periods of time “in between calls” when video interpreters can be engaged in statutorily protected communications.
50.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that the activities of video interpreters are unrestricted when they are not logged on.
51.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that there is no restriction on the conduct of video interpreters when they are logged on but not on a call with a client.
52.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that video interpreters are actually working, meaning engaged in a call, approximately 50% of the time that they are in the facility, excluding breaks and lunches. As a result, the ALJ failed to find that at least 15% or 20% of their work time they can be engaged in statutorily protected communications.
53.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that the video interpreters are entitled to 10 minute rest breaks every 4 hours under Purple policy and California law. During that time, they can engage in statutorily protected communications.
54.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that the employees are entitled to a 30 to 60 minute meal period, during which time they have to be relieved of all duties. During that time, they can engage in statutorily protected communications.

<u>No.</u>	<u>Cross-Exception</u>	<u>Language</u>
55.	Pg. 3, lines 4-4:16	To the failure of the ALJ to find that Purple expects that each of the video interpreters take a 10 minute break from each hour of interpreting with clients. During that period, the interpreters may engage in statutorily protected communications.
56.	Pg. 4, lines 23-24	To the failure of the ALJ to find that access is available during work time and non-work time.
57.	Pg. 4, line 24	To the failure of the ALJ to recognize that there is no “prohibition on non-business use of the company email system.” To the contrary, the prohibition is only for engaging in activities on behalf of “organizations or persons with no professional or business affiliation with the company” and “sending uninvited emails of a personal nature.” Nonetheless, the Charging Party agrees that the prohibition “is broad enough to encompass employees’ use of the email system for Section 7 activities.”
58.	Pg. 4, line 26	To the reference to “non-working time.” The prohibition in the handbook would apply to working time.
59.	Pg. 4, line 26-30	To the failure of the ALJ to find that, under the Board’s decision in <i>Purple</i> , the employer’s rules interfere with presumptively permitted activity during work time because the employer has not provided any special circumstances justifying limitation during work time except when the video interpreter is actually engaged in a call with a client.
60.	Pg. 4, line 32-42	The ALJ was misled. The Respondent is relying on the record to establish special circumstances. The fact that the Respondent failed to offer any additional evidence does not mean it will not argue that some special circumstances are reflected in the record.
61.	Pg. 4, line 36-37	To the failure of the ALJ to recognize that employees use the email system during work time for statutorily protected activities, which includes communications among themselves and with management concerning wages, hours and working conditions.
62.	Pg. 4, line 36-37	To the failure of the ALJ to recognize that employees used the email system during work time to communicate their opposition to the Union as well as to communicate with management about the circulation of anti-union Petitions.
63.	Pg. 5, line 10-9	To the failure of the ALJ to find that even these asserted reasons by management have no factual basis in the record.
64.	Pg. 5, lines 10-9	To the failure of the ALJ to recognize that he was misled by the Respondent. The Respondent did not withdraw the contention that

<u>No.</u>	<u>Cross-Exception</u>	<u>Language</u>
		there weren't special circumstances, it just failed to put on additional evidence and then raised the special circumstances in its brief.
65.	Pg. 5, lines 8-9	To the failure of the ALJ to find that the employees are presumptively entitled to use mail during work time absent a clear rule implemented by the employer limiting the use of email to specific work related and non-discriminatory uses of email.
66.	Pg. 5, fn. 8	To the failure of the ALJ to recognize that he was misled.
67.	Pg. 5, fn. 8	To the failure of the ALJ to find the concerns over "confidentiality, inappropriate communications, and computer viruses" are overbroad and vague and thus would encompass statutorily protected communications.
68.	Pg. 5, fn. 8	To the failure of the ALJ to recognize that these concerns are unlawful and that the Board should overrule the discrimination rationale of <i>Register-Guard</i> .
69.	Pg. 5, fn. 8	To the failure of the ALJ to find that these concerns were rebutted by the fact that Respondent permits employees to use the email system, including access to the intranet, from their home computers and personal smart phones and other devices. Thus, the ALJ incorrectly found that these "concerns are not particularly heightened." The concerns are pre-textual and non-existent on this record.
70.	Pg. 5, fn. 9	To the failure of the ALJ to permit the Charging Party to provide additional evidence. The Board expressly noted, in granting the Special Permission to Appeal but denying the Appeal on the merits, that the Charging Party would be allowed to raise those issues in exceptions. We hereby do raise those issues in these cross-exceptions.
71.	Pg. 5, fn. 9	To the failure of the ALJ to allow the Charging Party to present evidence as described in "Charging Party/Petitioner's Objection to Closing of the record and Offer of Proof," which was attached to Charging Party's Motion For Special Permission to Appeal. That Memorandum is incorporated here by reference, and Charging Party will address the specific issues in its Brief in support of these Cross-Exceptions.
72.	Pg. 5, fn. 9	To the failure of the ALJ to allow the Charging Party to put on additional evidence as to the appropriate remedy, including the necessity of broad notification. Charging Party incorporates by reference those specific factual issues that were referred in the Charging Party/Petitioner's Objection to Closing of the record and Offer of Proof, which is incorporated by reference. Charging Party

<u>No.</u>	<u>Cross-Exception</u>	<u>Language</u>
		will further address those specific issues in its brief.
73.	Pg. 5, Lines 10-6:35	To the failure of the ALJ to allow the Charging Party to provide additional evidence on remand.
74.	Pg. 6, lines 1-9	To the failure of the ALJ to allow the Charging Party to prove that the rule unlawfully discriminates in violation of Section 8(a)(3). This issue was litigated below, and it is litigated again and therefore is properly before the Administrative Law Judge and the Board. In fact, this rule is inherently destructive of employee rights and thus violates Sections 8(a)(3) and 8(a)(1) on that ground.
75.	Pg. 6, lines 11-35	To the failure of the ALJ to recognize that the Board's remand was broader than he interpreted it.
76.	Pg. 6, line 22	To the erroneous conclusion that the Board's remand "forecloses it." The Board's decision in <i>Purple</i> supports the conclusion that employees have the right to use electronic communications equipment during work time absent a clearly defined rule limiting their use to specific business purposes.
77.	Pg. 6, lines 22-28	See Cross-Exception immediately above.
78.	Pg. 6, lines 28-35	To the suggestion that the Charging Party was seeking special or extraordinary remedies. Rather, the Charging Party took the position that these remedies were standard remedies or should be standard remedies.
79.	Pg. 6, line 33	To the suggestion by the ALJ that remedial obligations "will be limited to the rescission of the policy." The ALJ ignored this by imposing additional obligations with respect to the implementation of any new policies.
80.	Pg. 6, lines 32-35	To the suggestion by the ALJ that any evidence on the scope of the remedy should have been presented in the initial hearing rather than in the subsequent hearing.
81.	Pg. 6, lines 37-41	To the Conclusion of Law that the employer's conduct does not violate Section 8(a)(3).
82.	Pg. 6, lines 37-41	To the failure of the ALJ to recognize that this policy encompasses other electronic communication systems and is invalid because the policy applies to more than just email. It applies to Internet, Intranet Voicemail and other forms of electronic communications.
83.	Pg. 6, lines 37-41	To the failure of the ALJ to recognize that the rule regarding "sending uninvited email of personal nature" is unlawfully overbroad

<u>No.</u>	<u>Cross-Exception</u>	<u>Language</u>
		because that would encompass emails sent for statutorily protected activities, including for or against the Union.
84.	Pg. 6, lines 37-41	To the failure of the ALJ to recognize that the Board's standard in evaluating the overbreadth rules announced in <i>Lutheran Heritage Village-Livonia</i> should be overruled.
85.	Pg. 6, lines 37-41	To the failure of the ALJ to recognize that the employer's electronic communications rule lawfully discriminates by prohibiting communications "on behalf of organizations." To that extent, the <i>Register-Guard</i> case should be overruled, and that form of discrimination should be found unlawful under both Sections 8(a)(1) and 8(a)(3).
86.	Pg. 6, lines 37-41	To the failure of the ALJ to recognize that the employer's electronic communications rule lawfully discriminates by prohibiting communications "on behalf of ... persons." The Supreme Court held that the word "person" includes a labor organization in <i>Citizens United</i> . To that extent, the <i>Register-Guard</i> case should be overruled, and that form of discrimination should be found unlawful under both Sections 8(a)(1) and 8(a)(3).
87.	Pg. 6, lines 43-7:9	To the remedy insofar as certain facilities are represented by the Charging Party, and the remedy would allow Respondent to unilaterally implement new policies without bargaining with the Charging Party or any incumbent union and those facilities where the Union is the representative.
88.	Pg. 7, line 11-24	To the failure of the ALJ to require posting on the company's internet, which is companywide, as well as physical posting in all locations.
89.	Pg. 6, line 43-7:24	To the Remedy in its entirety in that it does not include: <ul style="list-style-type: none"> (1) Intranet postings; (2) Mailing of the Board Notice to all employees and former employees; (3) Mailing of the Board decision where the employees will be able to understand the reasons for the Board remedy; (4) Appropriate language in the notice in which the employer acknowledges its unfair labor practice, such as: <p style="margin-left: 40px;">We have been found to have maintained unlawful rules restricting the use of employee email for protected concerted activity and union activity. We have agreed to rescind those rules and to allow you to use the email for</p>

No. Cross-Exception Language

- protected concerted Union activity during work and non-work times so long as it doesn't interfere directly with your job duties at the time;
- (5) Notice posting for the period of time from when the violation began until the notice is actually posted;
- (6) The Posting should be nationwide at all facilities;
- (7) The employer should email, on a regular basis, the notice of the Board Decision to each employee since it uses email system for distribution of employment related matters;
- (8) Because the employer maintains office meetings, it should be required to read and discuss the notice at office meetings;
- (9) The employees should be afforded work time to read the Board's Decision and the Notice;
- (10) The employer should allow 5 hours of time for employees to communicate about Section 7 matters to make up for the time that they have lost for such use by the maintenance of the unlawful rule;
- (11) The Notice should be posted on the employer's website with a link to the Decision on the Board's website;
- (12) Notice should be given to the Federal Communications Commission, which is Purple's principal source of funding of its illegal conduct;
- (13) Order Purple to reimburse the FCC for any fees it has spent in committing unfair labor practices and defending this litigation; and
- (14) The Notice should include a link or a QR code linking to the Board's App. of Employee Rights.
90. Pg. 7, line 28-8:15 To the Order in its entirety.
91. Pg. 7, line 33-34 To the limitation in the remedy in that it is applicable only to the email system. It should be applicable to all electronic communication policies.
92. Pg. 7, line 35 To the reference to "like or related manner." Those words should be stricken.
93. Pg. 7, line 38-39 The communications policy should be eliminated in its entirety and not just from any employee handbook.
94. Pg. 7, line 40-45 To the failure of the ALJ to require electronic notification of the elimination of the electronic policy and to take other remedial efforts as described in these cross-exceptions.
95. Pg. 7, line 40-45 To the suggestion that the employer has to have any electronic

No. Cross-Exception Language

communication policy. It may implement a new handbook without any electronic communications policy.

96. Pg. 7,line 46-8:11 To the failure of the ALJ to require posting throughout the facilities. Note that the ALJ's requirement that the notice be posted on the company's internet would require electronic posting throughout all the facilities.

97. To the Order in its entirety in that it fails to include the remedies requested above.

98. To the Notice in that it does not contain language consistent with an appropriate remedy.

Dated: June 23, 2015

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
DAVID A. ROSENFELD

Attorneys for Charging Party

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On June 23, 2015, I served the following documents in the manner described below:

9 ☒ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy
10 through Weinberg, Roger & Rosenfeld's electronic mail system from
 jwatkinson@unioncounsel.net to the email addresses set forth below.

Ms. Olivia Garcia,
National Labor Relations Board, Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017
olivia.garcia@nrlrb.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 23, 2015, at Alameda, California.

/s/ Jennifer Watkinson
Jennifer Watkinson